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January 30, 2006

The Honorable Mike Leavitt
Secretary of Health and Human Service
Centers for Disease Control and Prevention
Division of Global Migration and Quarantine
ATTN: Q Rule Comments
1600 Clifton Road, NE (E03)
Atlanta, GA 30333

Dear Secretary Leavitt:

We are writing to provide comments on the proposed regulations on the Control of Communicable Diseases in response to the Notice of Proposed Rulemaking dated November 30, 2005. We submit these comments on behalf of the following tribal clients of this firm: the Metlakatla Indian Community, the Menominee Tribe of Wisconsin, the Miccosukee Tribe of Indians of Florida and the Susanville Indian Rancheria.

The proposed regulations contain a number of provisions expressly applicable to Indian tribes or Indian country. Many of these reflect a concern that measures taken to control communicable diseases may be effective within Indian reservations. Our clients commend the Department for giving, for the first time, special attention to the ways in which the quarantine regulations should be applied to Indian tribes and their lands. On behalf of the Indian tribes and tribal organizations identified above, we approve and urge the adoption of a number of these provisions, with some modifications, to reflect existing law.

Section 70.24 expressly recognizes the right of a tribal health authority to request that the Director, Center for Disease Control (CDC), take quarantine measures and other public health measures, including the issuance of a quarantine order. The proposed regulations do not define "tribal public health authority." We recommend that this term be defined as "the federally recognized governing body of an Indian tribe or a tribal organization which has been delegated by an Indian tribe or Indian tribes the right to act on its or their behalf in providing health services or taking other action with respect to health."

We note that a number of the regulations provide for the CDC to consult with Indian tribes or with the Indian Health Service Director prior to taking actions which

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affect Indian tribes or their members. Our clients are pleased that their involvement in providing for the health of their members and others residing in Indian country is recognized by the proposed regulations at least to this extent. However, they are concerned that some of the sections, as explained below, fail to give due regard to the sovereign authority of tribal governments or their statutory rights under the Indian Self-Determination and Education Assistance Act (ISDEAA).

The most significant example of this is section 70.25 which authorizes the CDC Director (the CDC), when he or she determines that the measures undertaken by an Indian tribe are insufficient to prevent the spread of communicable disease, to take a series of enumerated measures and "other measures" to prevent the spread of disease. There is no requirement in this section for consultation with either the IHS Director or with the affected tribe. The Preamble to the proposed rule states that the CDC will "to the extent practicable" consult with the IHS Director prior to taking such actions and notify the IHS Director and the affected tribe once the action is taken. However, the actual regulation contains no such requirement.

While the proposed regulations include appeal procedures to permit an individual who is quarantined to request a hearing (see sections 70.20 and 70.31), no such appeal procedure is provided in the regulations in the case of action under section 70.25. On the other hand, sections 109 and 507 (a) (2) of the ISDEAA provide procedures under which the Secretary may reassume operation of a health program under the Indian Self-Determination and Education Assistance Act, with specific requirements as to the Secretary's obligation to satisfy the burden of proof that the statutory requirements permitting reassumption exist. While the Secretary's regulations permit emergency reassumptions in circumstances which may arguably be present under section 70.25 of the proposed quarantine regulations, an appeal and hearing are still assured under the ISDEAA.

We are concerned that the broad authority provided under the proposed regulations to the CDC, acting for the Secretary, to take a wide variety of actions in Indian country, including "other measures," may provide the CDC with authority to suspend or rescind a tribal contract to provide health services under the Indian Self-Determination and Education Assistance Act or to interfere with a tribe or tribal organization's performance of its contract with IHS in ways which are not permitted under the Indian Self-Determination and Education Assistance Act, itself.

We propose adding a notification and consultation requirement to proposed section 70.25 with respect to determinations involving health programs in Indian country, operated either directly by the Indian Health Service or by an Indian tribe or tribal organization under a self-determination contract or self-governance compact and funding agreement. Thus, section 70.25 should require, prior to making any determination concerning the insufficiency of IHS or tribal measures to prevent the spread of communicable diseases, that the CDC Director notifies either the IHS Director or the

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tribal health authority (whichever is appropriate) and arrange for meaningful consultation. Section 70.25 should also require the CDC Director, after such notification and consultation, to set forth in writing the reasons for his or her determination of insufficiency and for his or her adoption of whatever measures are considered necessary to remedy the situation. Such a requirement would be consistent with the ISDEAA and the Department's own policy requiring consultation with Indian tribes on matters that affect them. Section 70.25 should also include an appeal procedure by authorizing tribal health authorities to request a hearing under section 70.20. Please note that these provisions would not interfere with action by the CDC in a medical emergency but only require notification and provide for appeal rights following emergency action.

We recommend that the regulations specifically address the hearing issue by adding the following to section 70.25:

In the case of any such determination or measures applied in Indian country a tribal health authority may request a hearing under section 70.20. No such measures shall include the rescission of a contract or self-governance agreement under the Indian Self-Determination and Education Assistance Act or the reassumption of programs administered by any tribe or tribal organization thereunder except in compliance with the Indian Self-Determination and Education Assistance Act.

We also propose that the words "on the record" be added after the word "hearing" in subparagraph 70.20(a). This will require that such hearings conform to procedures under the Administrative Procedure Act.

In addition, section 70.27 authorizes the CDC, with the concurrence of the IHS Director, to take certain public health measures with respect to persons in Indian country. Consultation with the affected Indian tribe or Indian tribes is required, but no provision authorizes any appeal by the tribe from the CDC's action and the consent of the tribes is not required. This section also authorizes the CDC, with the concurrence of the IHS Director, to send employees and agents of a state into Indian country to enforce federal quarantine regulations. We recommend that, again, these provisions should be reconciled with the authority of Indian tribes and tribal organizations under Indian Self-Determination and Education Assistance Act and with tribal authority to provide for health matters involving their members. We proposed the following:

(e) In the case of any public health measure taken by the CDC under this section, any Indian tribe or tribal organization providing health services in the Indian country within which such measure is taken may request a hearing under the provisions of section 70.20. No such measure shall include the rescission of a contract or self-governance agreement under the Indian Self-Determination and Education Assistance Act or the reassumption of programs administered by any tribe or tribal organization

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thereunder, except in compliance with the Indian Self-Determination and Education Assistance Act.

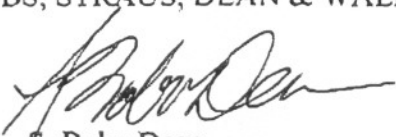
In some areas of the country, Indian tribes or tribal organizations administer programs which are the principal source of health care in their area although the area is not within Indian country as defined in section 70.1. We recommend an additional provision to address such situations (including those in which the tribe operates a federal facility and those in which it operates a non-federal facility). The following language should be added to section 70.26:

(c) In the case of any federal facility owned by the United States but operated by an Indian tribe or tribal organization under the provisions of the Indian Self-Determination and Education Assistance Act or any non-federally owned health facility operated by an Indian tribe or tribal organization under the Indian Self-Determination and Education Assistance Act, the CDC shall notify the tribe or tribal organization operating the facility of any proposed public health measure or combination of measures relating to that facility. No such measure shall include any action inconsistent with a contract or self-governance agreement under the Indian Self-Determination and Education Assistance Act or the rescission or reassumption of such contract or agreement except in compliance with the Indian Self-Determination and Education Assistance Act.

We appreciate the opportunity to submit these comments on behalf of the Indian tribes and tribal organizations identified above.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By:  S. Bobo Dean

By:  Duke McCloud